was that Joshi lied to the internal EEO investigator about the statements that he made to Jones during performance review. Joshi said he didn't recall them, but Joshi recalled the statements during deposition, which was over two and a half years after he made them. The argument was that it can be concluded that it's more likely than not that Joshi lied to the investigator to avoid the issue because he couldn't justify his statements under the scrutiny of age discrimination because that was his true motivation. Otherwise, he would have had no reason to lie.

Jones claimed that the statements Joshi made during performance review amounted to common law fraud. Lucent essentially claimed that Jones could not have been defrauded because he was an at-will employee who could have been terminated at any time. Jones claimed that, under the law, at-will employment was not an issue.

The district court granted summary judgment to Lucent on both counts. The district court's opinion did not acknowledge Jones's evidence of age discrimination. The district court settled the fraud claim on the issue of damages, repeating Lucent's argument, without addressing the fraud itself. The court's opinion is discussed more fully in the argument sections. Jones filed a motion to reconsider the judgment, which was subsequently amended. The motion was denied without further opinion. App. at 12a.

III.Proceedings In The Court Of Appeals

Jones appealed and the court of appeals affirmed the district court's judgment. The court did not acknowledge Jones's evidence for age discrimination. The court's order did not correctly address the nature of Jones's age discrimination claim. The court settled the fraud claim on the issue of

damages, repeating Lucent's argument, without addressing the fraud itself. The court's opinion is discussed more fully in the argument sections. During oral argument, the court did not ask Jones any questions. Jones filed a petition for rehearing and rehearing *en banc*. The petitions were denied, with no judges calling for a vote for a rehearing *en banc*.

REASONS FOR GRANTING THE PETITION

I. The Fraud Claim.

A. The Arguments Of The Courts Below Are Not Cogent And Contravene The Illinois Supreme Court.

The fraud claim is addressed first because it is the most egregious example of error. In the district court, Lucent argued that Jones could not have been defrauded of something because he was an at-will employee who could have been terminated at any time. Lucent cited *Stromberger v. 3M Co.*, 990 F.2d 974 (7th Cir. 1993) in support. Jones responded that the argument that was presented to the court in *Stromberger* was that the company committed fraud in order to get an employee to accept a severance package instead of firing him. Jones argued that the case bore no resemblance to his case as *Stromberger* itself proved, as the court stated: "The case might be different if Stromberger could show, but for this alleged fraud, he would not have quit *or* been fired." *Stromberger*, *supra*, at 978.

Nonetheless, the district court ruled that: "Even if Mr. Joshi's statement was false, in order to establish a claim of fraud, Mr. Jones must have been defrauded of something. Mr. Jones was an at-will employee, who could have been terminated at any time. *See Stromberger v. 3M Co.*, 990 F.2d

974, 976-77 (7th Cir. 1993)." In a motion to reconsider, it was again reiterated that *Stromberger* does not establish the law that an at-will employee cannot be defrauded from a job. The motion was denied without comment.

In the court of appeals, Jones cited pertinent authority for the correct holding of *Stromberger*. "Although it is easy to read the court's abstractions as declaring a blanket rule that at-will employees can never recover for fraudulent inducement, that is not precisely what the court held. The outcome in *Stromberger* was driven by the fact that the employee was at-will *and* that the employee, in any event, would have quit or been fired." *Cherry Payment Sys., Inc. v. Rogers*, 1996 WL 180080, *2 (N.D.Ill. 1996). Lucent's response maintained that: "The district court correctly relied on *Stromberger v. 3M Co.*, 990 F.2d 974 (7th Cir. 1993), by finding that Jones was not defrauded of anything because he was an at-will employee who could have been terminated at any time." Jones's response was: "Jones did not quit!"

Incredibly, the court of appeals' order stated: "Even could the statements support a claim of fraud (and we have serious doubts about that), there can be no claim because, in order for fraud to exist, Jones must have been defrauded of something. But he was an at-will employee, who could have been terminated at any time. *See Stromberger v. 3M Co.*, 990 F.2d 974 (7th Cir. 1993)." App. at 4a-5a.

The court of appeals follows this with: "There is no evidence that but for the alleged fraud, Jones would not have been terminated." as though this made *Stromberger* pertinent, which it does not since Jones did not quit. The district court had taken a similar position. Nonetheless, as explained later, *infra*, at 14-15, not only did Jones have evidence that he could have gotten his rating changed absent the fraud, but as a

dispositive matter, this argument, as a defense for Lucent, is barred by equitable estoppel.

In a petition for rehearing and rehearing en banc, the notion of at-will employment as a defense against fraud was unequivocally refuted by pertinent authority of the Illinois Supreme Court. 'When a discharge contravenes public policy in any way the employer has committed a legal wrong. However, the employer retains the right to fire workers in cases "where no clear mandate of public policy is involved."' *Palmateer v. International Harvester Co.*, 85 Ill.2d 124, 130 (1981) (citing omitted). While *Palmateer* itself was a retaliatory discharge case, it still holds that at-will employment does not allow Lucent to escape liability when violating the public policy against fraud. Yet the petition was denied without comment.

Three judges on the court of appeals, none of whom were on the panel, had written opinions regarding *Stromberger* and knew that it did not hold that an at-will employee could not be defrauded.

(1) Judge Posner wrote the *Stromberger* opinion in which he said, as previously noted, *supra* at 8: "The case might be different if Stromberger could show, but for this alleged fraud, he would not have quit *or* been fired." And as previously noted, Jones did not quit.

(2) Judge Ripple wrote a concurring opinion in *Stromberger* in which he said: "Two considerations prevent my joining the ground of decision adopted by my colleagues. First, I have difficulty in concluding, on the basis of the record before the district court, that Mr. Stromberger would have been discharged if he had not resigned. ... More importantly, I believe that, when our jurisdiction is based on

a diversity of citizenship, we ought to be very circumspect in choosing as an alternate ground for decision an interpretation of state law that has not been briefed fully by counsel or addressed by the district court." *Stromberger*, at 979.

Given the Illinois Supreme Court opinion in *Palmateer*, Judge Ripple's opinion would appear to be the better reasoned. And as detailed *infra*, at 14, Jones had admissible evidence that it was highly probable that he could have gotten his performance rating changed, had he not been induced to not pursue it with Joshi's boss. Although, this again being a moot issue.

(3) Judge Williams wrote the *Cherry Payment Sys.* opinion as a district court judge.

Yet none of these judges called for a vote on the petition for rehearing *en banc*.

Clearly, the courts below have not properly stated a rule of law based on *Stromberger* that can justify their rulings. Clearly, in citing impertinent authority which simply allowed the courts below to avoid addressing the fraud claim, the courts below have so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power. The courts below have not only failed to apply the law but have contravened the standards for granting summary judgment. And given the pertinent authority to the contrary, the lack of a cogent explanation of any kind for the courts' use of *Stromberger*, even when prodded by petitions for rehearing, reflects a desire to simply dismiss the claim rather than apply the law.

B. A Summary Grant Of Summary Judgment To Jones By This Court is Warranted.

As will be argued later, *infra*, at 28-29, a determination of summary judgment by this Court is warranted. The following concisely summarizes that Jones is entitled to summary judgment as a matter of law and certainly that Lucent is not.

Jones is required to prove five elements: (1) a false statement of material fact; (2) known or believed to be false by the party making it; (3) intent to induce the plaintiff to act; (4) action by the plaintiff in justifiable reliance on the truth of the statement; and (5) damage to the plaintiff resulting from such reliance. *Board of Education of City of Chicago v. A, C & S.*, 131 Ill.2d 428, 452 (1989).

(1) The statement that Joshi made to Jones during performance review that "This is just for my personal use." was a false statement of material fact because it implied that no one else would use the rating as an independent indicator of performance. But it was in fact used by others as the criteria for placing employees "at-risk" and subsequent termination.

(2) [From someone in Joshi's position, the statement is so blatantly false that he] could not think it true when he said it, so intent to defraud can be inferred from the statement itself. *See Stromberger*, at 978. While not detailed here, other pertinent law cited: "[Knowledge] is satisfied if defendant makes a representation with reckless disregard as to its truth." [citing omitted] ... The defendant's situation or "continuity of conduct" may support an inference of knowledge of falsity. *Diduck v. Kaszycki & Sons Contractors, Inc.*, 974 F.2d 270, 276 (2d Cir. 1992).

(3) Joshi's statements to Jones were in response to Jones questioning his rating. Rather than address the question and explain the rating, Joshi gave Jones a positive assessment of his performance by stating "You're in the middle." and trivialized the significance of the rating by saying "This is just for my personal use." It is apparent the intent was to persuade Jones to accept the band 4 rating and not challenge it any further.[1] Had Jones challenged his rating further, he would have had recourse to pursue the issue with Joshi's boss.

(4) The fact that Jones did not pursue his performance rating with Joshi's boss proves that he relied on Joshi's statements. While Lucent argued that Jones was not justified in relying on Joshi's false statement, and the argument is fully addressed in the Appellant Brief at 37-40, in short, Jones was justified in relying on Joshi's statements because Joshi was the one who conducted the performance review and was charged by the company with providing this information to Jones. Joshi's superior position and knowledge make Jones's reliance justified as a matter of law and not a question of fact. "[O]ne is justified in relying upon the representations of another, without independent investigation, where the person to whom the representations are made does not have the same ability to discover the truth as the person making the representations." *Gerill Corp. v. Jack L. Hargrove Builders, Inc.*, 128 Ill.2d 179, 195 (1989).

(5) Jones was subsequently terminated due to his band 4 rating. Jones would not have been terminated but for his band 4 rating. As a direct result, Jones suffered consequential

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[1] At deposition, when asked what he meant by "This is just for my personal use," Joshi stammered around as if he were trying to avoid the question before answering: "I don't recall."

damages substantially quantified as a loss of service pension and benefits which Jones would have qualified for when Lucent offered an early retirement incentive package two months after his termination. Consequential damages are "those loses which might be expected to follow from the fraud and from events that are reasonably foreseeable." *See W. Keeton, Prosser and Keeton on Torts* § 105, at 767 (5th ed. 1984). Joshi's rating Jones as a poor performer created, *per se*, a risk of termination. More importantly, the business conditions at the time were such that it was reasonably foreseeable that a business restructuring could occur and that Jones could be terminated due to his performance rating.

Clearly, the opinions of the courts below do not cogently address the evidence in this case. It should be noted that the opinions make such statements as "There is no evidence that but for the alleged fraud, Jones would not have been terminated." Had Joshi not induced Jones to accept the performance rating, Jones would have had recourse to get his rating changed. Joshi's boss testified that the band 4 rating was not consistent with the assessment of being "in the middle." This is admissible evidence which the courts below cannot simply dismiss with a self-serving assertion. On the contrary, there was no admissible evidence that Jones could not have gotten his performance rating changed. Considering that Joshi was a new supervisor, it is virtually certain that his boss would have exercised oversight and corrected the rating to agree with the assessment that both Krishnan and Joshi gave to Jones that he was "in the middle."

However, as a matter of law, this is a moot point. As detailed in Appellant's Brief at 45-46, this argument is barred by equitable estoppel and public policy against fraud. "Equitable estoppel prevents a party from taking advantage of [its] own wrongdoing." *Hubble v. O'Connor*, 291 Ill.App.3d

974, 986 (1997). The fraud induced Jones to not further pursue challenging his rating. Therefore, any argument that the outcome of such an action is not known for certain, having been fraudulently prevented, is barred as a matter of law because allowing Lucent to prevail on such an argument would allow Lucent to benefit from the fraud.

The facts as they pertain to the fraud claim are not in dispute. Lucent's arguments that Jones did not suffer damages or that Jones's reliance was not justified are not supported by law. There was no cogent basis for Lucent being granted summary judgment as a matter of law. In contrast, Jones's reliance was justified as a matter of law and clearly Jones suffered damages. The option exists for this Court to order a summary disposition granting summary judgment to Jones based on the existing appellate briefs[2] and/or the record below without the expense of producing new briefs.

II. The Age Discrimination Claim.

The following is a synopsis of Jones's age discrimination case that the courts below did not address.

(1) Joshi lied to Jones, and ultimately committed fraud, in order to rate Jones in band 4.

(2) There is admissible evidence that Joshi's motivation for lying was due to an age bias.

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[2] The appellate briefs are available online, at http://www.ca7.uscourts.gov/briefs.htm using case number 04-4094.

(3) Jones was terminated due to his band 4 rating. Jones would not have been terminated but for the band 4 rating.

(4) As a mixed-motive case, Joshi's age bias from the band 4 rating imputes to the ultimate decision makers.

A. Jones Has Admissible Evidence Of An Age Bias.

As this Court has ruled, in the context that circumstantial evidence is sufficient: "In order to obtain [a mixed-motive instruction], a plaintiff need only present sufficient evidence for a reasonable jury to conclude, by a preponderance of the evidence, that [a protected characteristic] was a motivating factor for any employment practice." *Desert Palace v. Costa*, 539 U.S. 90, 101 (2003). This was not new law to the Seventh Circuit which had previously established that: "All that is required [to prove intentional discrimination] is evidence from which a rational trier of fact could reasonably infer that the defendant had fired the plaintiff because the latter was a member of a protected class." *Troupe v. May Department Stores*, 20 F.3d 734, 737 (7th Cir. 1994).

Jones has such evidence. As previously noted in the fraud claim section, *supra*, at 12-13, Joshi lied to Jones in order to place him in band 4. And as previously noted in the factual background section, *supra*, at 6, as part of seeking an explanation for this, Jones initiated an internal EEO age discrimination investigation against Joshi based on Jones having previously indicated his desire of wanting to be able to retire. "Notification of an intent to retire is so inexorably linked with age that it cannot be viewed as a separate factor." *E.E.O.C. v. Community Unit School Dist. No. 9, Madison County, Ill.*, 642 F.Supp. 902, 905 (S.D.Ill. 1986). The EEO investigator asked Joshi about the statements he made to Jones during performance review. The investigator reported that

Joshi "said he didn't recall saying that." But it is simply implausible that Joshi didn't recall the statements when he was asked about them because he recalled the statements when being deposed, over two and a half years after making them. A reasonable jury would certainly conclude that it was more likely that Joshi lied to the investigator to avoid the issue because he couldn't justify his statements under the scrutiny of age discrimination because that was his true motivation. Otherwise, he would have had no reason to lie. "Such an inference is consistent with the general principle of evidence law that the factfinder is entitled to consider a party's dishonesty about a material fact as "affirmative evidence of guilt." *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 146 (2000) (citing omitted). Joshi's response was also consistent with Joshi avoiding the issue when Joshi notified Jones that he was at-risk and Jones asked Joshi what this was based on, even though Joshi knew the reason and the evidence indicates that Joshi had been trained to not pass blame. See *supra*, at 5.

B. The Courts Below Simply Ignored The Evidence Of Age Bias and Contravened This Court's Ruling In *Desert Palace v. Costa*.

The issues with the court of appeals' decision are probably best addressed by initially stating the observation that was made in Jones's petition for rehearing, pp. 7-8.

> A pattern has now developed. The Panel's Order tracks the structure of Lucent's Appellee Brief. The content and phraseology of the Panel's Order are taken from Lucent's Brief. Lucent didn't comprehend how the mixed-motive nature of *Price Waterhouse* applied to this case and that unawareness was brought directly into the Panel's Order. The Panel's argument

> regarding *Troupe* includes Lucent's completely irrelevant argument. There is no cognition of Jones's evidence and argument in the Panel's Order. The most likely explanation for this is that the Panel didn't read the Appellant Brief.

It is a matter of law that Jones has admissible evidence of age bias, *supra*, at 16-17. To hold otherwise would be to effectively set the standard of proof as an admission of guilt, which would nullify the law since, as the Seventh Circuit has stated: "[E]mployers have taught their supervisory employees not to put discriminatory beliefs or attitudes into words oral or written." *Troupe*, at 736.

Yet the courts below have refused to acknowledge this evidence. The district court stated: "Mr. Jones claims that direct evidence of discrimination entitles him to summary judgment. Mr. Jones's evidence can be summarized as follows. ... Nothing in this summary suggests that Mr. Joshi placed Mr. Jones into a Band 4 performance rating because of age discriminatory reasons." App. at 7a. The summary did not mention the internal EEO age discrimination investigation or the evidence derived from it. Therefore, the fallacy of the district court's argument is obvious. In the amended motion to reconsider (at p. 2), it was stated that: "The summary fails to acknowledge that Joshi lied in order to place Plaintiff in band 4 and completely omits all of the material facts that are evidence of Joshi's motive for lying." The motion was simply denied without explanation. See App. at 12a.

The court of appeals did the same thing. "Jones contends that direct evidence of discrimination entitles him to summary judgment. The evidence consists primarily of .... In other words, Jones points to no impermissible motive for Joshi's

evaluation, as would be required to prove his case under *Price Waterhouse v. Hopkins* ...." See App. at 3a.

Then, treating circumstantial evidence separately from *Price Waterhouse*, as Lucent did (See Appellee Brief at 9-14), the court of appeals continued with: "Jones also has not mustered circumstantial evidence of intentional discrimination ...*See Troupe* ...In fact, the evidence indicates otherwise." The court then went on with an argument about how, at the time Joshi rated Jones, Joshi didn't know that a workforce reduction was about to happen so he could not have rated Jones in band 4 in order to get him fired. The court's argument simply repeats Lucent's irrelevant argument. The court concludes with: "Factors to which Jones points as evidence of age discrimination simply do not carry the day." See App. at 3a.

The court of appeals' reasoning is erroneous because it does not address Jones's case, either in evidence or law. Jones has never argued that Joshi was trying to get him fired because this is not something of which Jones bears the burden of proof. The court is simply repeating Lucent's spurious argument for an irrelevant issue of Lucent's own creation because Lucent can't address the issue of Joshi's motivation for lying. As Lucent did not understand the mixed-motive nature of the instant case[3] or the relevance of *Desert Palace*

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[3] Lucent stated: 'While Jones labels *Price Waterhouse* a "direct evidence" case, in reality, it is a mixed motive case ....' Appellee Brief at 9. But Lucent never grasped the mixed-motive nature of the instant case. What Jones actually said was: "Jones proves his case using the Price Waterhouse direct evidence framework. Direct evidence in this sense refers to the direct approach of producing evidence; ... evidence that relates to motivation. With this

to *Price Waterhouse*, similarly, this is missing from the court's argument. The structure of the court's argument alone completely contravenes *Desert Palace*. In addition, the court's cursory dismissal of Jones's evidence shows that the court is either unaware of the pertinent evidence or is simply refusing to acknowledge it. As the court's argument has no cogent basis in fact or law, the court contravenes the summary judgment standard. As a matter of law, Jones's burden is to show that age was a motivating factor, which he has done.

It should be noted that, while Jones does not bear the burden of proving that Joshi was trying to get Jones fired, the court's argument still fails because, as noted previously, *supra*, at 14, "the business conditions at the time were such that it was reasonably foreseeable that a business restructuring could occur and that Jones could be terminated due to his performance rating." And as stated in Jones's petition for rehearing (at 9), "it can be inferred from the totality of the evidence that Joshi actually wanted Jones terminated."

Regardless of whether the court of appeals read the appellant's briefs, the court's refusal to acknowledge and address admissible evidence of age bias that was sufficient as a matter of law, and to so abrogate the standard for granting summary judgment, both in evidence and the law, clearly so far departs from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power.

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approach, both direct and circumstantial evidence is admissible." Appellant Brief at 18-19.

C. This Court Should Grant Summary Judgment To Jones.

Again, as will be argued later, *infra*, at 28-29, a determination of summary judgment by this Court is warranted. Jones presented a properly supported motion for summary judgment. Therefore, procedural law is pertinent to a ruling on the motion. "When a motion for summary judgment is made and supported ..., [the nonmoving] party may not rest upon the mere allegations or denials of the [nonmoving] party's pleading, but ... must set forth specific facts showing that there is a genuine issue for trial." *Fed.R.Civ.P. 56(e)*. "The non-movant has an affirmative duty to come forward to meet a properly supported motion for summary judgment." *Publishers Resource, Inc. v. Walker-Davis*, 762 F.2d 557, 561 (7th Cir. 1985).

Jones provided admissible evidence that Joshi's motivation for lying to Jones was due to an age bias. Jones argued that summary judgment should have been denied to Lucent simply because Lucent provided no evidence of Joshi's motivation for lying in order to rate Jones in band 4. Lucent responded with:

> In arguing that Lucent presented no evidence of Joshi's motive for rating Jones in Band four (Appellant's Brief at 22), Jones misconceives who has the burden of proof. In order to shift the burden to the defendant to show that it would have made the same decision absent an unlawful motive under *Price Waterhouse*, the plaintiff must first show that an impermissible motive played a role in the adverse employment decision. ... But Jones has totally failed to point to any evidence of an impermissible motive in rating him in Band four, and he cannot establish a

> case under the *Price Waterhouse* mixed motive analysis.

Appellee Brief at 10-11. Besides reflecting that Lucent doesn't grasp the mixed-motive nature of the instant case or its burden in opposing a summary judgment motion, Lucent simply denies there is any evidence. And when finally acknowledging Jones's argument separately as circumstantial evidence, among the numerous denials of any evidence was: "While Jones argues that this demonstrates an ulterior motive, Jones points to no evidence of an ulterior motive or that any ulterior motive was related to Jones' age." Appellee Brief at 11.

These are exactly the kinds of denials that are insufficient, as a matter of procedural law, to create an issue of fact. It is therefore undisputed that Joshi lied to Jones to place him in band 4 due to an age bias. It follows directly from this fact and the other circumstances of the case that Jones should be granted summary judgment. A strict application of procedural law would allow this Court to order a summary disposition on the merits granting summary judgment to Jones. Absent this, the following section shows that the evidence is so one-sided that a jury could only reach one conclusion, in Jones's favor.

D. Lucent Should Not Have Been Granted Summary Judgment.

Clearly from the preceding section, Lucent did not establish that there were no undisputed facts such that they would be entitled to summary judgment. But also conspicuously absent from the opinions below was the fact that Jones completely rebutted Lucent's argument for summary judgment. This is addressed here because the court made the cursory assertion that: "But there is no evidence

Joshi placed Jones in band four for any reason other than his evaluation of Jones's performance." App. at 3a. In addition to Joshi's undisputed statement that "You're in the middle," which was a positive statement of satisfactory performance, plus the fact that Joshi lied to Jones in order to place him in band 4, Jones showed that there was no credible evidence that his performance was poor.

Lucent's main defense was to create a *post hoc* rationalization to try to justify Joshi's band 4 rating of Jones, mainly as part of an indirect method analysis. Lucent tried to take statements from Jones's performance review form, meant as areas for improvement, and characterize them as critical comments justifying Joshi's rating. However, these characterizations were refuted by other statements from the form and Lucent actually impeached itself in its district court briefs. Appellant Brief at 27-30. In the court of appeals, Lucent's argument was reduced to: "Jones next argues that his 2000 performance review did not reflect performance problems, but the fact remains that the Objective and Appraisal Form pointed out action that Jones needed to take, ..." Appellee Brief at 12. Lucent's argument hardly supports an assertion of poor performance. As the Seventh Circuit had recognized in a case involving a division of a predecessor of Lucent: "That managers criticized employees judged generally satisfactory is hardly surprising. Constructive criticism is an important managerial tool." *Gustovich v. AT&T Communications, Inc.*, 972 F.2d 845, 849 (7th Cir. 1992). Lucent essentially conceded that Jones's actual performance wasn't poor when it stated: "In the final analysis, however, whether Joshi erred in ranking Jones in Band four or in evaluating his performance on the review form does not establish age discrimination." Appellee Brief at 13.

Attempts by Lucent and the courts below to refer to Jones's 1998 band 4 rating to bolster an assertion of poor performance in 2000, even though Jones exhaustively disputed its relevance, were equally invalid. As the Seventh Circuit had previously recognized: "Although, in some circumstances, previous employment history may be relevant and probative in assessing performance at the time of termination, its limited utility must also be recognized. ...Nor can such evaluations, standing alone, create a genuine issue of triable fact when, as here, there have been substantial alterations in the employee's responsibilities and supervision in the intervening period." *Fortier v. Ameritech Mobile Communications, Inc.*, 161 F.3d 1106, 1113 (7th Cir. 1998). Plus, the previous ratings could not have influenced Joshi because all the testimony was that when Joshi rated Jones in band 4, he was unaware of Jones's previous performance ratings.

The evidence is so one-sided that a jury could only conclude that, rather than address the issues in this case, Lucent simply attempted to create a *post* hoc rationalization to justify Jones's rating. Lucent clearly should not have been granted summary judgment. The evidence warrants granting summary judgment to Jones.

E. Postscript

Not every error could be addressed. However, this Court should not perceive such errors as credible arguments that counter Jones's argument. Among these are: (1) the reference to 5 performance bands operating something like a bell curve (App. at 2a) should not be construed to imply that supervisors were forced to rate some employees as poor performers in bands 4 and 5; (2) the statement that Krishnan gave Jones a band 4 rating in mid-year 2000 (App. at 2a) is

categorically false, not even Lucent made this claim; (3) the whole indirect method analysis (App. at 4a) is flawed because Jones had a separate argument for this, but the contention that "Jones cannot show he was performing up to his employer's legitimate expectations" is simply another biased instance of ignoring admissible evidence and contravening the summary judgment standard.

III. The Rulings Below Violate The Due Process Clause Of The Fifth Amendment To The Point Of Reflecting Bias.

In describing the protection afforded by the due process clause of the Fifth Amendment, this Court stated: "Our whole system of law is predicated on the general fundamental principle of equality of application of the law. This is a government of laws and not of men[.] ...[C]ourts are expected to ... apply laws." *Truax v. Corrigan*, 257 U.S. 312, 332 (1921). The rule of law has played no role in the decisions rendered below in the instant case. While there is anecdotal evidence of a belief that the Seventh Circuit favors the defendant in employment discrimination cases, the instant case demonstrates "a clear inability to render fair judgment" by a refusal to apply the law "that is so extreme" as to "deserve to be characterized as bias." *See Liteky v. United States*, 510 U.S. 540, 551 (1994). Such a violation of the due process clause of the Fifth Amendment is clearly a departure from the accepted and usual course of judicial proceedings, as to call for an exercise of this Court's supervisory power.

It is typical for a court to refer to the standard for granting summary judgment. The opinions below do not even allude to the standard. For example:

> We review the district court's grant of summary judgment *de novo*, viewing all facts and drawing all reasonable inferences in the plaintiffs' favor. ... Summary judgment is appropriate if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.

Grimm v. Alro Steel Corp., 410 F.3d 383, 385 (7th Cir. 2005). For the instant case, the court of appeals simply stated: "Our review is *de novo*."

In the district court, Judge Bucklo stated in a recent opinion:

> Summary judgment is appropriate where the record and affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. ... I must construe all facts in the light most favorable to the non-moving party and draw all reasonable and justifiable inferences in favor of that party.

Nance v. Chicago Christian Industrial League, 2005 WL 1030209, *1 (N.D.Ill. 2005). In the instant case, Judge Bucklo made no statement about the standard of review.

When viewed in the context of the following instances where the opinions below appear to exhibit bias or do not follow the law, there is certainly an appearance that these omissions are not coincidence.

(1) For the fraud claim, the courts below cited *Stromberger* as pertinent authority, without any explanation, after it was explicitly shown to not be pertinent. See *supra*, at 8-11. This reflects an improper bias to simply dismiss the

claim rather than apply the pertinent law. This clearly contravenes the summary judgment standard.

(2) In arguing that: "There is no evidence that but for the alleged fraud, Jones would not have been terminated," the court of appeals not only ignored, without any explanation, the dispositive law of equitable estoppel that favored Jones, but also ignored the evidence that Jones could have gotten his rating changed, absent the fraud. See *supra*, at 9-10 and 14. This clearly contravenes the summary judgment standard.

(3) In denying the fraud claim, the court of appeals stated: "Even could the statements support a claim of fraud (and we have serious doubts about that),...." App. at 4a. Given that the court did not analyze the fraud claim, the parenthetic statement could be taken as an improper predisposition against Jones.

(4) The court of appeals contravened *Desert Palace* and the summary judgment standard with regard to Jones's circumstantial evidence of age discrimination. In addition, the court's argument was irrelevant. See *supra*, at 18-20.

(5) As stated previously, *supra*, at 17-18, the argument of the court of appeals is consistent with the court not having read the appellant's briefs. The appearance of basing a ruling solely on the defendant's appellee brief, given the other appearances of bias, reflects an improper predisposition favoring Lucent.

(6) The summary judgment standard was clearly applied unequally. Lucent defeated Jones's motion for summary judgment even though Lucent provided no admissible evidence to raise an issue of fact regarding Jones's evidence of age bias. See *supra*, at 21-22. Lucent was granted

summary judgment even though Jones completely exposed Lucent's argument as a *post hoc* rationalization of Jones's performance rating in which Lucent impeached itself. See *supra*, at 23-24.

(7) The courts below entertained irrelevant evidence. In particular, Jones's 1998 performance rating was irrelevant as to his performance in 2000.

Jones has an unassailable case that he is entitled to summary judgment as a matter of law. Had the courts below mentioned the standard for granting summary judgment, it would have introduced a cognitive dissonance into the opinions because the courts did not follow the standard. When the evidence is viewed as a whole, there is the appearance that the courts below chose to prevent this conflict by not mentioning the standard. This implies that the courts below knew they were contravening the law and that the errors were due to bias, not faulty reasoning. "[W]hat matters is not the reality of bias or prejudice, but its appearance." *Liteky*, at 548. The fact that the courts below refused to provide a cogent explanation for their decisions, when prompted by the motion to reconsider in the district court and the petitions for rehearing in the court of appeals, indicates that the courts below feel that they can contravene the law with impunity. To the extent that this is a result of the courts' zeal to "dispose promptly of the business of the court," many other discrimination litigants are affected.

The impartiality of the courts below "might reasonably be questioned" in the instant case. The demonstrated appearance of bias elevates the question of the determination of summary judgment to one that should be answered by this Court, as remanding this case for further consideration would simply allow the courts below to render a biased judgment but with

a less obviously biased opinion so as to preclude this Court from considering it again.

CONCLUSION

This case is not the result of an imagined slight. Jones suffered damages as a result of being lied to. The law gives Jones recourse to recover for those damages. Jones presented a case to the courts below for which he had admissible evidence, law and causal connection for every aspect. Jones believes that he is entitled to summary judgment. Yet Jones has now gone through practically the entire process and Lucent has been granted summary judgment without ever providing an explanation of why Jones was lied to. And the judges have never specifically addressed Jones's argument in its entirety, let alone provided a cogent explanation for it being flawed. The interest of justice and due process cry out for this Court to grant the writ of certiorari. Otherwise, this Court will be granting the courts below the license to dismiss employment discrimination cases with impunity.

For all the reasons contained herein, the writ of certiorari should be granted. Ideally, this petition, in conjunction with the record below, will allow this Court to order a summary disposition on the merits, granting summary judgment to Jones on both his claims.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 04-4094

[Filed June 13, 2005]

ROBERT W. JONES,	)
Plaintiff-Appellant,	)
	)
v.	)
	)
LUCENT TECHNOLOGIES, INC.,	)
Defendant-Appellee.	)
	)

Appeal from the
United States District Court
for the Northern District of Illinois, Eastern Division
No. 02 C 8057
Elaine Bucklo, *Judge*

Before Hon. JOEL M. FLAUM, *Chief Judge*
Hon. WILLIAM J. BAUER, *Circuit Judge*
Hon. TERENCE T. EVANS, *Circuit Judge*

ORDER

Robert W. Jones sued his former employer, Lucent Technologies, Inc., alleging that his termination from employment involved age discrimination, in violation of the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.*, and common law fraud. The district court denied Jones's motion for summary judgment and granted Lucent's. Our review is de novo. Nese v. Julian Nordic Constr. *Co.*, 405 F.3d 638 (7th Cir. 2005). Other than the fact that Jones was 46 years old and therefore within the protected age group when he was terminated, we see not the slightest evidence of either discrimination or fraud.

Jones began working for a predecessor of Lucent Technologies in 1979. In 1998, he received a poor performance rating--a rating in "band four." The performance ratings were done by supervisors, who were required to place employees in bands which reflected their level of competence. There were five bands, and they operated something like a bell curve. Bands four and five were the low end of the curve. Again in 1999 and mid-year 2000, Jones received a band four rating from supervisor Sivaram Krishnan. Then Amesh Joshi, who was one year younger than Jones, became his supervisor. Joshi consulted with Krishnan and again placed Jones in band four. At an interview, Jones contends he told Joshi that he wanted to work 4 more years and then retire. Joshi does not recall the statement but acknowledges it is possible Jones said it.

At the time of Joshi's evaluation of Jones, it was not common knowledge that Lucent was anticipating a reduction in force. But as it turned out, in January 2001, one of Joshi's superiors learned there would be a force reduction and employees in bands four and five were slated for termination.

Jones was notified in February that he was at risk for termination and had until April 15 to find another position at Lucent. He did not find a position, and his employment was terminated on April 15.

Jones contends that direct evidence of discrimination entitles him to summary judgment. The evidence consists primarily of his statement to Joshi that he hoped to retire at the end of 4 years. Joshi does not deny Jones might have told him about his retirement hopes. But there is no evidence Joshi placed Jones in band four for any reason other than his evaluation of Jones's performance. There is no indication Joshi was influenced by Jones's comment about retiring. There is no evidence Joshi believed a person who was looking toward retirement would be a poor performer. Furthermore, Jones did not challenge the rating. In other words, Jones points to no impermissible motive for Joshi's evaluation, as would be required to prove his case under Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).

Jones also has not mustered circumstantial evidence of intentional discrimination--that is, a "mosaic" of evidence from which an inference of discriminatory intent might be drawn. See Troupe v. May Dep't Stores Co., 20 F.3d 734 (7th Cir. 1994). In fact, the evidence indicates otherwise. At the time Joshi rated Jones in band four in November 2000, Joshi did not know that a workforce reduction was about to happen or that employees rated in band four would be terminated. Joshi had no say in determining which employees would be terminated. Therefore, it is not possible to infer that Joshi's rating was really an effort to have Jones terminated because he was 46 years old. Factors to which Jones points as evidence of age discrimination simply do not carry the day.

Jones's claim also fails under the indirect method of proof set out in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), which requires first that he show by a preponderance of the evidence the existence of a prima facie case of discrimination. To make out a prima facie case, he must show that he is 40 or older; he was performing his job up to his employer's legitimate expectations; he was subject to an adverse employment action; and similarly situated and substantially younger employees were treated more favorably that he was. Once Jones establishes a prima facie case, Lucent must articulate a legitimate nondiscriminatory reason for its action. If it does, then Jones can prevail only by showing that Lucent's articulated reason was pretextual.

Jones cannot show he was performing up to his employer's legitimate expectations. The evidence shows he was receiving poor performance ratings. In addition, he has not shown that similarly situated younger employees were treated more favorably than he was. He has not argued that everyone in bands four and five--those terminated--were older employees or that all the employees retained were substantially younger than he was. Finally, Lucent articulated a nondiscriminatory reason for the termination--a workforce reduction in which employees in bands four and five were chosen to be terminated. Jones has not shown that somehow this reduction in force was a pretext for discrimination.

In his common law fraud claim, Jones contends that Joshi's statements to him at the time of his 2000 performance review were false and caused him to forego challenging his band four rating, which, of course, ultimately resulted in his discharge. Those statements were "You're in the middle," "You're not on any list," and "This is just for my personal use." Even could the statements support a claim of fraud (and we have serious doubts about that), there can be no claim

because, in order for fraud to exist, Jones must have been defrauded of something. But he was an at-will employee, who could have been terminated at any time. See Stromberger v. 3M Co., 990 F.2d 974 (7th Cir. 1993). There is no evidence that but for the alleged fraud, Jones would not have been terminated.

Accordingly, the judgment of the district court is AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

No. 02 C 8057

[Filed Mar 16 2004]

ROBERT W. JONES,	)
Plaintiff,	)
	)
v.	)
	)
LUCENT TECHNOLOGIES,	)
Defendant.	)
	)

MEMORANDUM OPINION AND ORDER

Plaintiff Robert Jones, born on May 9, 1954, claims that he lost his job with defendant Lucent Technologies, Inc. ("Lucent") due to age discrimination. Mr. Jones alleges that he relied on statements by his supervisor, Umesh Joshi, that a low performance rating would not be used for any purpose, and as a result did not challenge the rating when it was given to him. Mr. Jones alleges that his performance rating and Mr. Joshi's statements were the result of age bias and constituted common law fraud. Lucent and Mr. Jones seek

summary judgment. I grant Lucent's motion and deny Mr. Jones' motion for the reasons stated below.

Mr. Jones claims that direct evidence of discrimination entitles him to summary judgment. Mr. Jones's evidence can be summarized as follows. In mid-2000, Mr. Joshi began supervising Mr. Jones. When Mr. Joshi asked Mr. Jones about his goals for the next two to five years, Mr. Jones replied that he hoped to retire at the end of four years. At the end of 2000, Mr. Jones was placed into a Band 4 performance rating by Mr. Joshi. During Mr. Jones' performance review, in response to Mr. Jones' concerns, Mr. Joshi said, "Maybe I should explain. You're in the middle. I'm on the conference calls. I know the contribution you make. You're not on any list. This is just for my personal use." Mr. Jones did not challenge his performance rating, though he was aware of Lucent's process for doing so. On February 15, 2001, Mr. Jones was notified that because of his Band 4 rating, he was being placed "at-risk" for termination in an upcoming downsizing by Lucent. In April 2001, Mr. Jones was terminated.

Nothing in this summary suggests that Mr. Joshi placed Mr. Jones into a Band 4 performance rating because of age discriminatory reasons. Mr. Jones' motion for summary judgment on this count is denied, and he cannot survive summary judgment on this evidence.

While Mr. Jones claims to be proceeding under the direct method of proving age discrimination, the indirect method would not help him. To establish a prima facie claim under the indirect method, Mr. Jones must show that (1) he is a member of a protected class; (2) that he was meeting the legitimate business expectations of his employer; (3) that he suffered an adverse employment action; and (4) that other

similarly-situated employees, not in the protected class, were treated more favorably. *Biolchini v. General Elec. Co.*, 167 F.3d 1151, 1153-54 (7th Cir.1999) (citing *McDonnell Douglas v. Green*, 411 U.S. 792, 802, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973)). Lucent argues that Mr. Jones cannot establish the second and fourth prongs of this test, and I agree.

The fact that Mr. Jones was given a performance rating in Band 4 shows that he was not meeting Lucent's legitimate business expectations. *See, e.g., Haywood v. Lucent Techs., Inc.*, 323 F.3d 524, 530-31 (7th Cir.2003). Mr. Jones received such an unfavorable rating not just in 2000 but also in previous years. His statements that the rating was unwarranted are not sufficient to establish that he was, in fact, meeting Lucent's legitimate business expectations. *Id.*

Mr. Jones also cannot establish that younger, similarly-situated employees at Lucent were treated more favorably. Mr. Jones admits that no one younger than he was, who was also rated in Bands 4 or 5, was not terminated. While Mr. Jones argues that some of his job duties were given to a younger employee after his termination, that is not the test dictated by the law. *See, e.g., Pitasi v. Gartner Group, Inc.*, 184 F.3d 709, 716 (7th Cir.1999). Mr. Jones' age discrimination claim also fails under the indirect method. Lucent's motion for summary judgment on Count I is granted. Mr. Jones' common law fraud claim is that Mr. Joshi's statement during his 2000 performance review that "this is just for my personal use" misled him, resulting in his failure to challenge his performance rating and his ultimate termination. Even if Mr. Joshi's statement was false, in order to establish a claim of fraud, Mr. Jones must have been defrauded of something. Mr. Jones was an at-will employee, who could have been terminated at any time. *See*

Stromberger v. 3M Co., 990 F.2d 974, 976-77 (7th Cir.1993). He makes no showing that "but for" the statement by Mr. Joshi, he would not have been terminated. *Id.* at 978. While Mr. Jones argues that he would have challenged his performance rating had Mr. Joshi not made his statement, Mr. Jones does not show that this would have had any effect. In fact, Mr. Jones says that at least one other employee challenged her performance rating, to no effect. Mr. Jones has not shown that he was injured even if Mr. Joshi's statements were false. Mr. Jones' motion for summary judgment on Count II is denied, and Lucent's motion for summary judgment on Count II is granted.

ENTER ORDER:

/s/ Elaine E. Bucklo
United States District Judge

Dated: March 15, 2004

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 04-4094

[Filed August 30, 2005]

ROBERT W. JONES, *Plaintiff-Appellant*,	)
v.	)
LUCENT TECHNOLOGIES, INC., *Defendant-Appellee*.	)

Appeal from the
United States District Court
for the Northern District of Illinois, Eastern Division
No. 02 C 8057
Elaine Bucklo, *Judge*

Before Hon. JOEL M. FLAUM, *Chief Judge*
Hon. WILLIAM J. BAUER, *Circuit Judge*
Hon. TERENCE T. EVANS, *Circuit Judge*

ORDER

On June 24, 2005, the plaintiff-appellant filed a petition for rehearing and petition for rehearing en banc. All the judges on the original panel have voted to deny a rehearing, and none of the judges in active service have requested a vote on the petition for rehearing en banc.[1] The petitions for rehearing and rehearing en banc are therefore DENIED.

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[1] The Honorable Ilana Diamond Rovner did not participate in the consideration of the suggestion for rehearing en banc.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 02 C 8057

[Filed November 4, 2004]

ROBERT W. JONES,	)
Plaintiff,	)
	)
v.	)
	)
LUCENT TECHNOLOGIES,	)
Defendant.	)
	)

MINUTE ORDER

MINUTE ORDER of 11/3/04 by Hon. Elaine E. Bucklo: Plaintiff's motion to alter [70-1], amend [70-2], or reconsider judgment is denied [70-3].

(2)

No. 05-639

FILED

JAN 20 2006

In The

Supreme Court of the United States

ROBERT W. JONES,

Petitioner,

v.

LUCENT TECHNOLOGIES, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR REHEARING

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ARGUMENT

I. Introduction

With all due respect, is there no institution remaining in this country with self-imposed integrity? That will be the appropriate question if this Court fails to grant this petition for rehearing and fails to grant the petition for a writ of certiorari.

This Court is obligated to the rule of law, as are the courts below. As Chief Justice Roberts stated in his opening remarks of his conformation hearing: "Judges and justices are servants of the law, not the other way around."[1] Denying this petition places judges above the law. If the judicial system were a corporation, Eliot Spitzer would be suing it for fraud. However, that is not possible. Only this Court can fulfill the enforcement function. As Chief Justice Roberts concluded in his opening remarks, "If I am confirmed, I will be vigilant to protect the independence and integrity of the Supreme Court, and I will work to ensure that it upholds the rule of law and safeguards those liberties that make this land one of endless possibilities for all Americans." No Justice on this Court should hold himself or herself to a lesser standard.

The law clerk(s) who wrote a memorandum for the cert petition failed to grasp the significance of the questions presented as to their impact to the judicial system. There are no more important questions than the ones presented in the cert petition because what is at issue is the undermining of this Court's legitimacy and that of the

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[1] Transcript available at http://www.asksam.com/ebooks/JohnRoberts/confirmation_hearing.asp by clicking on "Confirmation Hearing Transcripts On-Line". See "Day 1" of transcript.

courts below. As Chief Justice Roberts stated: "Because without the rule of law, any rights are meaningless." Similarly, the rulings made by this Court become meaningless when the resulting law is contravened.

II. The Fraud Claim

This is not a case involving asserted errors consisting of erroneous factual findings or the misapplication of a properly stated rule of law. This case involves a refusal to apply the law. The first question presented in the cert petition was essentially: "Did the court of appeals contravene Illinois state law in ruling that petitioner Jones was not defrauded of his job because he was an at-will employee who could have been terminated at any time . . . ?" Perhaps this question was routinely dismissed as not cert worthy because it did not reflect an important federal question. However, the federal court was exercising supplemental jurisdiction over a state law claim and was required to follow state law. "Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state." *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938). The court of appeals attempted to refer to *Stromberger v. 3M Co.*, 990 F.2d 974 (7th Cir. 1993), in support of its assertion that: "Even could the statements support a claim of fraud . . . , there can be no claim because, in order for fraud to exist, Jones must have been defrauded of something. But he was an at-will employee, who could have been terminated at any time." *Cert Pet. App.*, at 4a-5a. The court of appeals did not cite a quote from *Stromberger*, the court simply referred to the case. The cert petition (pp. 8-11) makes clear that not only does *Stromberger* not support this assertion, but the assertion is simply false and it is not the

law. The Illinois Supreme Court is clear on this issue, as stated in the cert petition (p. 10). "When a discharge contravenes public policy in any way the employer has committed a legal wrong. However, the employer retains the right to fire workers in cases "where no clear mandate of public policy is involved."' *Palmateer v. International Harvester Co.*, 85 Ill.2d 124, 130 (1981) (citing omitted). It is unequivocal that the court of appeals did not properly state a rule of law and is contravening the state law.

This Court should be compelled, by its obligation to the rule of law, to step in for the Illinois Supreme Court and uphold the rule of law. Otherwise, this Court is ruling that the court of appeals is above the law regarding state law issues simply because this Court is not sufficiently interested in issues of state law. In so doing, this Court puts itself above the law by not upholding the law established in *Erie*, *supra*.

III. The Age Discrimination Claim

The second question presented in the cert petition was: "Did the court of appeals contravene this Court's decision in *Desert Palace v. Costa*, 539 U.S. 90 (2003), regarding the use of circumstantial evidence and the standard of proof in a mixed-motive discrimination case?" This is also not an issue involving asserted errors consisting of erroneous factual findings or the misapplication of a properly stated rule of law. The basic facts underlying this case are not really in dispute. The cert petition (pp. 16-17) concisely summarizes the evidence of age bias. The fact that age bias can be inferred from the underlying facts was derived strictly from the application of the law; law that the courts below were obligated to apply. The cert

petition (pp. 18-20) documents that the courts below refused to acknowledge the evidence. The courts below did not cite any law, either properly stated or otherwise, that would allow them to ignore the evidence and contavene the applicable law in this case. This cannot simply be considered an instance of erroneous factual findings when the courts below did not even mention *Desert Palace* and therefore cannot be assumed to have been applying the law in their fact finding. The opinions below do not reflect fact finding. They reflect a refusal to apply the law. This is magnified by the fact that the courts below similarly did not cite the law as to the standards that they were applying for summary judgment. The cert petition (pp. 25-28) documents that the courts below did not apply the law when it came to the standards for granting summary judgment. This was the third question presented.

Not only is age bias inferred by applying the law but Jones's argument that he should be granted summary judgment is a conclusion based on the application of the law. *See Cert Pet.*, at 21-22. So is the conclusion that Lucent should not have been granted summary judgment. *See Cert Pet.*, at 22-24. The strength of Jones's case is magnified by the fact that the courts below neither acknowledged Jones's evidence nor addressed his argument. That is because Jones's application of the law was unassailable. Had there there been a flaw in Jones's argument, the courts below would have addressed it rather than ignoring the evidence and the argument.

This case is an instance where the courts below simply decided what they wanted the result to be and did not even make a veiled attempt at a cogent argument to support it. During Chief Justice Roberts' confirmation hearing, he was asked by Senator Cornyn: "[D]o you start

with the results you want to reach first and then go back and try to rationalize it . . . ?" Chief Justice Roberts' response was:

> No, Senator. Saying a judge is result-oriented, that type of judge, that's about the worst thing you can say about a judge. It's about the worst thing you can say, because what you're saying is you don't apply the law to tell you what the result should be. You don't go through the judicial decisional process. You don't look to the principles that are established in the Constitution or the law. You look to what you think the results should be, and then you go back and try to rationalize it. And that's not the way the system is supposed to work.[2]

That's not the way the system is supposed to work but it still happens. The case of *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993), memorializes a logically fallacious argument which prevailed over a well reasoned dissent. In short, it was a debate over whether proof of pretext was sufficient to compel judgment for the plaintiff in the *McDonnell Douglas* indirect method approach (*McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973)) or whether pretext-plus was required. Regardless of whether one agrees with the judgment, it is an example of the Court rationalizing the result it wanted.

In *St. Mary's*, *supra*, the dissent maintained that "it remains clear that today's decision stems from a flat misreading of *Burdine* and ignores the central purpose of the *McDonnell Douglas* framework. . . ." *St. Mary's*, at 533

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[2] See "Day 2" of transcript from footnote 1, under Cornyn questions.

(and referring to *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981)). The majority opinion proved by contradiction[3] that the dissent was correct. The majority opinion stated: "The principal case on which the dissent relies is *Burdine*. While there are some statements in that opinion that could be read to support the dissent's position, all but one of them bear a meaning consistent with our interpretation, and the one exception is simply incompatible with other language in the case." *Id.*, at 515. The proposition that the majority opinion's reading of *Burdine* is correct leads the majority to the false and contradictory conclusion that the *Burdine* Court could not write a consistent opinion. This proves that the majority opinion's reading of *Burdine* was not correct. If the decision in *St. Mary's* had been arrived at by applying the law, the dissent should have prevailed on this point.

The dissent also maintained that: "The Court is unrealistically concerned about the rare case in which an employer cannot easily turn to one of its employees for an explanation of a personnel decision." *Id.*, at 539, n. 12. Here too, the dissent had the stronger argument and should have prevailed. The majority opinion attempted to dismiss, as "utter implausibility", that the dissent's argument could be valid. *See id.*, 513-514. The majority opinion described in vivid detail a hypothetical case that would be an exceptional occurrence, in order to argue that the dissent's view must be rejected because it did not provide a

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[3] In a proof by contradiction, to disprove a proposition p, the procedure is to show that assuming p is true leads, via a valid argument, to a logical contradiction. Since the conclusion is false, and the argument is valid, the only possibility is that the proposition is false. See, for example, at http://www.wikipedia.org, the article for "contradiction" containing the subtopic "proof by contradiction."

perfect solution. This argument neither rendered the dissent's argument utterly implausible nor provided logical support for the majority's argument because it cannot be assumed that a perfect solution exists.[4]

There were other logical fallacies in the majority opinion's argument but the real debate, which was not explicitly stated as such, was about the standard of proof; that being a preponderance of the evidence, which means that there needed to be a greater than 50% probability that discrimination occurred. The dissent's argument was one which recognized fairness to both sides in the case law and should have prevailed. The majority opinion clearly argued in favor of the employer for anything less than 100% probability. And in this regard the dissent was also correct when it stated that: "The Court today decides to abandon the settled law that sets out this structure for trying disparate-treatment [discrimination] cases, only to adopt a scheme that will be unfair to plaintiffs, unworkable in practice, and inexplicable in forgiving employers who present false evidence in court." *Id.*, at 533. The settled law that the Court abandoned was, *inter alia*, 'giving both plaintiff and defendant fair opportunities to litigate "in light of common experience as it bears on the critical question of discrimination."' *Id.*, at 525.

While the *St. Mary's* Court had the authority to reach the decision that it did, in light of the strength of the dissent's argument, it would be a delusion to believe that the decision was a result of applying the law rather than abandoning existing law and then attempting to use the

[4] See the articles for "perfect solution fallacy" and "misleading vividness" at http://www.wikipedia.org.

law to rationalize the decision. However, the courts below are obligated to uphold existing law, not abandon it. The instant case uses the direct approach to proving employment discrimination established in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) and *Desert Palace*. This Court is still obligated to uphold *Desert Palace* until such time as it is overturned. As noted earlier, the instant case represents a refusal of the courts below to apply the law. This Court should be compelled, by its obligation to the rule of law, to uphold the law established in *Desert Palace*. Otherwise, this Court is putting itself above the law.

As the dissent stated in *St. Mary's*: "The majority's scheme greatly disfavors [discrimination] plaintiffs without the good luck to have direct evidence of discriminatory intent." *Id.*, at 534. Jones has "direct evidence" under *Desert Palace*. Failing to uphold *Desert Palace*, now the defining law in the direct approach to proving employment discrimination, would be the final nullification, by the courts, of the employment discrimination laws. That which was presaged by the dissent in *St. Mary's* has come to fruition. "To the extent that workers . . . decide not to sue, given the uncertainties they would face under the majority's scheme, the legislative purpose in adopting [discrimination laws] will be frustrated. To the extent such workers nevertheless decide to press forward, the result will likely be wasted time, effort, and money for all concerned." *Id.*, at 537. The frustration of the discrimination laws (a form of partial nullification) also occurs because attorneys are not motivated to pursue an objective that they consider futile, past the point where it is of some benefit to themselves. Stepping into first person for a moment, I dealt with one attorney during discovery who stated to me, in trying to get me to drop the age discrimination claim, that:

"Judges are Republicans who are pro-business. They dismiss these cases on summary judgment just because that's the way they want it to be." I could have made an argument that he was just walking the case through discovery to collect money and never had any intention of getting to the summary judgment phase. It should not have been overly idealistic of me to reject his advice and expect more from the judicial system than that. However, there has been nothing that has occurred during this process to suggest that he was wrong and in fact, he may have been representing my best interest once he had taken care of his own best interest. However, I switched attorneys, and even so, if I hadn't done most of the work following discovery, the work wouldn't have gotten done. My perception has been that this case has been walked through a process for the purpose of simply getting it off the books.

CONCLUSION

This Court has great discretionary power to grant a petition. However, in a case where this Court's supervisory power is called for in order to uphold the rule of law, as in the instant case, this Court's discretionary power should yield in deference to its obligation to uphold the rule of law. For all the reasons contained herein, this Petition for Rehearing should be granted.

Respectfully submitted,

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RULE 44 CERTIFICATION

I certify that this Petition for Rehearing is presented in good faith and not for delay. The ground for this petition is limited to the argument that, in denying the Petition for a Writ of Certiorari, this Court is failing to uphold the rule of law and is thereby putting itself and the courts below above the law.

ROBERT W. JONES, *Pro Se*